to be a tendency among magistrates to call for the defence in what I would call "border-line" cases. Magistrates should read the provisions of section 173(f) of the Criminal Procedure Code very carefully. Under no circumstances should a magistrate call for the defence just to clear any doubt he may have in his mind. In this particular case the defence in no way helped the trial magistrate to clear any doubt he might have in his mind. On the contrary the defence helped to confuse the issue to a greater extent. The appellant stated that as he was approaching a junction he saw a motor car parked at the left side of the road facing the town. He saw a man leaning "to the side of the car's offside" whatever that may mean. The appellant sounded his horn and slowed down. The man "moved backwards" whatever that may mean. The appellant swerved his lorry to avoid hitting the man. The lorry attendant's story was quite different. He stated he saw an Indian "walking from the left side of the lorry to the other side of the road". The Indian knocked against the near-side of the lorry. The accident occurred after the lorry had passed the stationary car. There was nothing in the evidence to even show that the appellant was driving without due care and attention.

The appeal is allowed. The finding and sentence reversed and the appellant acquitted and discharged.

Appeal allowed.

Solicitors: *George & Khoo.*

G. P. De SILVA & ORS. v. CHUA YAM THONG

[O.C.J. (Suffian J.) March 23, 1962]

[K.L. — Civil Suit No. 390 of 1960]

Land laws — Joint proprietors of land — Agreement to divide land — No application to Collector to partition — Erection of houses by one joint proprietor (defendant) on portion of land allotted to him under agreement — Sales by another joint proprietor subsequently of portion of his share — Whether purchasers and original joint proprietors entitled to share profits derived from houses built by defendant.

The first and second plaintiffs and the defendant were registered proprietors of an undivided one-third share each in a piece of land. In 1953 and 1954 the defendant cut down the coconut and rubber trees on a portion of the land and erected a number of temporary houses. In 1955 the second plaintiff sold one-third of his undivided share in the land to the 3rd plaintiff and in 1956 sold another one-third to the 4th plaintiff. In an action by the plaintiffs for an account of profits derived from the houses, payment of their shares and for damages on the basis that defendant had carried through the whole operation of erecting the houses without their consent and knowledge, the defendant alleged that his building operations were confined to a portion of the land which had been allotted to him as his share under an oral agreement made with the first and second plaintiffs in 1951 and that the plaintiffs were consequently estopped.

Held: it was established by the evidence adduced by the defendant that there was an agreement in 1951 between the 1st and 2nd plaintiffs and himself under which a division of the land was made. As the defendant had erected the houses only on that portion of the land which had been allotted to him under the agreement, the claims of the 1st and 2nd plaintiffs must fail. The 3rd and 4th plaintiffs were successors in title of portions of the share of the 2nd plaintiff and were bound by the agreement. Their claims must also therefore fail.

Case referred to:—

(1) *Ramsden* v. *Dyson* (1866) L.R. 1 H.L. 129, 140.

The following cases were also cited during argument: *Ord* v. *Ord* [1923] 2 K.B. 432; *Murugappa Chettiar* v. *Chinniah* [1962] M.L.J. 95; *A.G. to Prince of Wales* v. *Collom* [1916] 2 K.B. 193 and *Mold* v. *Whitcooft* (1859) 54 E.R. 202, 206.

CIVIL SUIT.

R. Ponnudurai for the plaintiffs.

R. Tallala for the defendant.

Cur. Adv. Vult.

Suffian J.: The land in dispute is Lot 485 in the Mukim Batu in Kuala Lumpur held under E.M.R. 5831, 1 acre 3 roods 23.8 poles in area. Many years before the war it was registered in the name of Mr. de Silva as the sole proprietor. Before his death he transferred it to his three sons and in due course they appeared on the register as the proprietor each of a one-third undivided share.

In 1942 one of the brothers sold his share to the second plaintiff.

Another brother sold his share to Mrs. Wickramanayaka. In 1951 she sold her share including the family house of the de Silvas to the defendant.

The position then was that the first plaintiff (the sole surviving de Silva's brother). the second plaintiff and the defendant were registered proprietors of an undivided one-third share each in the land.

After his appearance on the scene the defendant proceeded to erect houses on the land.

After such erection, in 1955 the second plaintiff sold one-third of his undivided share to the third plaintiff and in 1956 another one-third to the fourth plaintiff.

The position at the time of this litigation is that the first plaintiff and the defendant are registered proprietors of a one-third undivided share each, while the second, third and fourth plaintiffs are registered proprietors of one-ninth undivided share each in the land.

The complaint is that all the plaintiffs and the defendant, five persons in all. are only the registered proprietors of undivided shares in the land, the defendant in 1953 and 1954 without the consent and knowledge of the then other co-proprietors had cut down coconut and rubber trees on the land and further caused damage by removing large quantities of earth and causing two wells to be dug and soon thereafter defendant, despite protests by the then other co-proprietors, had erected a number of temporary houses occupying a major portion of the land and rented out the said premises, the defendant neglected to account for the profits derived from the houses, and the plaintiffs claim an account of such profits, payment of their shares, damages, any other relief and costs.

The defendant admits filling up wells, cutting down trees and removing earth, but says that when he bought the land in 1951 he and the then co-proprietors, the first and second plaintiffs, orally agreed to divide the land among themselves into three portions as follows: the defendant was to be entitled to a strip nearest to Kuala Lumpur, referred to in the evidence as Portion A; the second plaintiff to a strip in the middle extending from the back to the front boundary, referred to as Portion B; the first plaintiff to a strip furthest from Kuala Lumpur, referred to as Portion C. The defendant contends that all these acts were done on Portion A which had been agreed should be his and were done with the full knowledge of the first and second plaintiffs. As regards the temporary houses, the defendant admits building them, but contends that they were built on the portion which had been agreed should be his and the plaintiffs did not protest against him building.

The defendant says that the plaintiffs are estopped and not entitled to the prayers asked for.

In my opinion there are two questions for decision in this case:

(a) Had the first and second plaintiffs orally agreed in 1951 to sub-divide the land in the manner alleged by the defendant, so as to allocate Portion A to the defendant, Portion B to the second plaintiff and the undeveloped portion C to the first plaintiff? If so, the third and fourth plaintiffs, the successors in title to part of the share of the second plaintiff, are bound by such agreement and all the plaintiffs' claim must fail.

(b) If not, when the defendant began to build on Portion A supposing it to be his own, did the first and second plaintiffs, the then only other co-proprietors, perceiving his mistake, abstain from setting him right and leave him to persevere in his error? If so, they and the other two plaintiffs as well are estopped from afterwards profiting by the defendant's mistake which they might have corrected.

The law on the first issue, as I understand it from section 44(i) of the Land Code, Cap. 138, is that the co-proprietors are entitled to the land in undivided shares in the proportions specified on the register. As land includes "things attached to the earth", section 2, this means that they are also entitled to the fruits of the houses built by the defendant, in undivided shares in the proportions specified on the register. But if in fact it is true, as the defendant alleges, that when he bought the land in 1951 the then co-proprietors agreed that he should get Portion A, then the other co-proprietors are no longer entitled to any interest in Portion A or in any of the houses built on it.

The law on the second issue is stated by Lord Cranworth, the Lord Chancellor, in *Ramsden* v. *Dyson* [1] as follows:—

"If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a court of equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers that, when I saw the mistake into which he had fallen, it was my duty to be active and to state my adverse title and that it would be dishonest in me to remain wilfully passive on such an occasion, in order afterwards to profit by the mistake which I might have prevented."

On the pleadings I ruled that it was for the defendant to prove the existence and terms of the alleged agreement and estoppel.

Before entering into the heart of the matter, I shall deal with certain aspects of this case which in my view have no bearing on the two main issues.

The rates on the houses built by the defendant were paid by him throughout until the end of 1961 when they were paid in equal parts by the third and fourth plaintiffs. The payment by the third and fourth plaintiffs was made after the filing of this suit on the advice of their solicitors. The third plaintiff said that the reason for their paying was to prevent the land from being sold up by the Kuala Lumpur Municipality which had threatened to do so unless payment was made within a few days. I do not think that this payment has either advanced or weakened the plaintiffs' claim in any way.

The first and second plaintiffs only paid quit rent on this land and none of the other co-proprietors. The defendant contends in his pleadings that he also paid quit rent. I do not think that payment of quit rent affects the issues either way, for failure to pay may result in the land being sold up by the Collector of Land Revenue and whoever made the payment must have been aware of this.

No building plans of the houses erected by the defendant were submitted to the Kuala Lumpur Municipality for approval before the erection of the houses. The plan of only one house, namely, No. 415L, eventually bought and now occupied by D.W.3, was submitted but after it had been completed. This plan was produced in court and I had a look at it; it only bore the signature of the defendant as owner. In the Kuala Lumpur Municipal area where this land is situate no buildings may be erected without the prior approval of the Municipality who insist on the submission of plans. These plans require the signature of all the persons who are registered as proprietors of the land concerned. The plaintiffs submit that no plans were submitted by the defendant because he knew that the other co-proprietors would not have agreed to his building and would not have signed the plans. What was the true intention of the defendant in not complying with the building by-laws? Having given this matter careful thought, I feel justified in rejecting the plaintiffs' submission, because it is common knowledge that many people not only in Kuala Lumpur but also in other local authority areas deliberately and openly have built houses without submitting plans and it is probable that the failure by the defendant to submit plans was due not to sinister motives but rather to his reluctance to spend money on plans or to his desire to build quickly.

Nor do I think that the evidence of D.W.2 is of any help on the main issues. According

to him, in 1951 the land had been apportioned by the then co-proprietors and his principal, Mrs. Wickramanayaka, was to take what is approximately Portion A, which was later sold by this witness on behalf of his principal to the defendant. He also said that the centre portion corresponding approximately to Portion B, on which stood a house, belonged to another co-proprietor, while the far portion, corresponding approximately to Portion C, on which there was no building of any kind, this witness thought belonged to the first plaintiff. But under cross-examination he admitted that he had no first-hand information about these matters and he could not guarantee the truth of what he had heard. I accept the plaintiffs' submission that this evidence is hearsay and unreliable.

Then there is the evidence of D.W.3, now the owner of house No. 415L. This house was built by Hang Kah Sim in 1953 or thereabout. Hang paid $15 per month ground rent to the defendant. In 1956 Hang sold it to D.W.3, who now pays the defendant the ground rent of $15 per month as well as the rates on the house. This witness said that none of the plaintiffs had ever asked him for rent nor told him that he had no right to live in the house. But this witness did not come into the picture until 1956, that is, until after the two letters dated 13th August, 1955, and 16th August, 1955, at pages 1 and 3 of exhibit A. It was obvious that by that time a dispute had arisen between the plaintiffs and the defendant. Accordingly, I hold that this witness's evidence does not in any way affect the issues.

As regards the third plaintiff, a registered proprietor of an undivided one-ninth share, in 1955 he tried to buy the first plaintiff's share. He wanted Portion C which was vacant. So the letter dated 13th August, 1955, at page 1 of exhibit A was sent to the defendant. As can be seen from the reply to it dated 16th August, 1955, at page 3 of exhibit A, the defendant objected to the sub-division proposed, and the deal fell through. Eventually this witness bought in 1956 a third of the second plaintiff's share.

In 1955 when this witness was negotiating with the first plaintiff to buy his share, the first plaintiff told him that the houses on the land had been put up by a co-proprietor and there was a dispute about it. In 1956 when he bought from the second plaintiff, the second plaintiff did not say that the land had been sub-divided, he only said that he would sell him a share. Except to the extent which I shall state later, I do not think that this witness's evidence is of any help in deciding the issues in this case.

Nor do I think, except to the extent which I shall state later, was the evidence of the fourth plaintiff of much help. She did not come into the picture until 1955, when she bought a one-ninth share in the land from the second plaintiff, two years after the construction of the houses in dispute. When she visited the land prior to her buying the share, the second plaintiff, the vendor, pointed out to her a specific portion, namely, that between his house, which stands approximately in Portion B, and the front boundary, which would be allotted to her after sub-division.

Having eliminated the evidence of D.W.2 and D.W.3 as being of no help to the court, I am left with the evidence of the defendant, the first and second plaintiffs and to some extent with the evidence of the third and fourth plaintiffs in helping me arrive at a finding on the two issues. Having considered their evidence with great care and some anxiety, I have come to these conclusions:—

(a) the defendant has discharged the onus of proving that there was an agreement in 1951 between him and the then co-proprietors that the land was to be sub-divided between them in the manner alleged by the defendant; accordingly the plaintiffs are precluded from claiming a share in the fruits of the developments effected by the defendant on his portion of the land; and

(b) when the defendant began to build on Portion A, the first and second plaintiffs did protest, but it is difficult to determine the degree to which such protests were made. Certainly the second plaintiff protested only against the building of the "second lot" of houses erected after he had moved from Pahang back to the land. Regardless of my finding as to the degree in which the first and second plaintiffs protested, after anxious thought I have come to the conclusion that the protests were made not because there had been no previous agreement to sub-divide in the manner alleged by the defendant, but because of encroachment by the defendant and because of the high-handed manner in which the defendant brushed aside their objections.

I shall now state the reasons for my two findings of fact above.

The first and second plaintiffs took Mr. Edgar, their solicitor, to the land one Sunday to object to the defendant building. This must have been in 1952 or 1953 when the buildings or some of them were going up. On another occasion the second plaintiff also took with him a police sergeant to the land. Yet neither plaintiff, even after they had retained Mr. Edgar, ever wrote to the defendant denying the existence of the agreement to sub-divide. In 1955 when the first plaintiff tried to sell his share to the third plaintiff, the first and second plaintiffs instructed Mr. A. K. Sen, their then solicitor, to write the letter dated 13th August, 1955, at page 1 of exhibit A. It was significant that in that letter it was stated in paragraph 2 that the co-proprietors, that is, including the defendant, had agreed to sub-divide the land and that the portion given to the first plaintiff was in fact the vacant Portion C which the defendant said had been agreed for the first plaintiff, and the portion to be given to the second plaintiff (and the fourth plaintiff to whom he had sold part of his share) was Portion B though different in shape and that the defendant was to get Portion A though also different in shape. The shapes of the second plaintiff's and the defendant's portions have been altered, in my view, because it was thought that the defendant had encroached and the new shapes were to equalise their shares. The defendant objected to the new apportioning and in consequence the attempted sale by the first

to the third plaintiff fell through. The statement of claim stated in paragraph 7 that the houses built by the defendant occupied a *major* portion of the land. The second plaintiff was emphatic in his evidence that the portion occupied by these houses was *much more* than a third of the land.

In his reply dated 16th August, 1955, at page 3 of exhibit A, the defendant's solicitor wrote to the first and second plaintiffs' solicitor objecting to the proposed sub-division in these words —

" [The proposed sub-division] is preposterous as the proposed sub-division donates a few houses to [Portion] B".

This means that some houses built by the defendant on Portion A would, if the proposed sub-division were agreed to, go to the second and fourth plaintiffs and the defendant objected to this happening. This should have indicated to Mr. Sen that in the defendant's view there was in existence a previous sub-division, though this was not stated in so many words, and that the sub-division proposed in Mr. Sen's letter differed from the original agreed sub-division. If in fact there had been no original sub-division, one would have expected an immediate written denial to that effect to be despatched to the defendant's solicitor by Mr. Sen. In fact nothing of the kind happened until nearly five years later, 22nd April, 1960, when the plaintiffs, this time all the four, instructed their then solicitors, Messrs. Rajendra and Teik Ee, to write to the defendant the letter at page 4 of exhibit A, stating that what had been done by the defendant had been done without the consent of any of the plaintiffs, and demanding from the defendant an account of the profits derived from the houses and the payment to them of their respective shares in such profits. I am of the view that the absence of any written protest until 22nd April, 1960, against the existence of the agreement which according to the defendant existed, constitutes very strong evidence in favour of the defendant.

During the course of the hearing in company with counsel and all the parties I visited the land. Portion C which according to the defendant had been agreed should belong to the first plaintiff was vacant and, except for a few trees, undeveloped. Portion B which according to the defendant had been agreed should belong to the second plaintiff had a house approximately in its middle. It was built in 1942 by the second plaintiff with the permission from the then co-proprietors and he lives in it today. The houses built by the defendant on his Portion A were built behind a well-defined line. When the first plaintiff wanted to sell his share to the third plaintiff, it was significant to me that he proposed to sell Portion C and not any other portion. When the second plaintiff wanted to sell part of his share to the fourth plaintiff, it was significant to me that he pointed out to her a specific portion between his house and the front boundary as being the portion to be allotted to her. All these factors strongly indicate to me that there had been an understanding between the first plaintiff, the second plaintiff and the defendant as to their respective shares on the ground and that this litigation would not have been launched if in fact the defendant had agreed to the delimitation of his portion as proposed by the first and second plaintiffs in their solicitor's letter dated 13th August, 1955.

From their demeanour, it was apparent that the first plaintiff was annoyed by the attitude taken by the defendant though he was somewhat shame-faced by the claim launched against the defendant, while the second and fourth plaintiffs are basically more interested in a fair and just sub-division of the land.

Considering the findings of facts at which I have arrived, I have no alternative but to dismiss the plaintiffs' claims.

But I venture to think that this need not result in an injustice because it is still open to any of the parties to apply to the Collector under section 106 of the Land Code to have a partition of the land made. After such enquiry as may be deemed necessary, the Collector may cause the land to be sub-divided or he may direct a sale of the land. If he sub-divides it, he may in his discretion award sums to be paid for the purpose of equalising the value of the parts. The Collector is familiar with lands and their value in the district and is in an excellent position to do justice among the parties.

Claim dismissed.

Solicitors: *Rajendra & Teik Ee; Richard Talalla.*

CHUAN SENG & CO. PINEAPPLES FACTORY v. IDRIS & ANOR.

[C.A. (Thomson C.J., Hill and Good JJ.A.) March 31, 1962]

[J.B. — F.M. Civil Appeal No. 2 of 1962]

Negligence — Negligence of servant — Liability of master — Accident to unauthorised passengers in lorry — Invitees or trespassers.

A lorry driver employed by the defendants gave a lift to two persons in his lorry. As a result of the negligence of the driver, the lorry overturned and the two persons were killed. In an action against the defendants on the ground that they were vicariously liable in damages to the estates of the deceased, evidence was adduced, which was uncontradicted, that the driver had been instructed by the defendants not to give lifts.

The trial judge disbelieved this evidence and stating that it did not matter whether the deceased were invitees or trespassers held that the defendants were vicariously liable. On appeal,

Held: (1) in such cases, the distinction between invitees and trespassers is of the utmost importance;

(2) on the facts, the deceased were clearly trespassers, and the defendants were not therefore liable.